

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RUDY MARTIN GARCIA,

Defendant.

NO. CR-10-0001-EFS

**ORDER ENTERING RULINGS FROM
NOVEMBER 16, 2011 HEARING**

A motion hearing occurred before the sentencing in this matter on November 16, 2011. Defendant Rudy Martin Garcia was present, represented by Peter Schweda. Assistant United States Attorney Matthew Duggan appeared on behalf of the United States Attorney's Office (USAO). Before the Court were Defendant's Motion for New Trial, ECF No. [409](#), and the USAO's Motion for Upward Sentencing Departure, ECF No. [429](#). At the hearing, the Court denied Defendant's motion and granted the USAO's motion in part. This Order serves to memorialize and supplement the Court's oral rulings.

I. DEFENDANT'S MOTION FOR NEW TRIAL

Defendant moves for a new trial on three bases. First, defense counsel asserts that the Court's involuntary manslaughter instruction was improper. Second, defense counsel argues that not allowing him to

1 testify to specific instances of violence by the victim, David McCraigie,
2 was error. Finally, defense counsel argues that the Court's decision not
3 to admit photos from Mr. McCraigie's "MySpace" page was error.

4 Under Federal Rule of Criminal Procedure 33, "the court may vacate
5 any judgment and grant a new trial if the interest of justice so
6 requires." The decision whether to grant or deny a motion for new trial
7 is within the discretion of the trial court. *United States v. Shaffer*,
8 789 F.2d 682, 687 (9th Cir. 1986). For the reasons expressed at the
9 hearing and discussed below, the Court denies Defendant's motion.

10 **A. Involuntary Manslaughter Instruction**

11 Defense counsel argues that giving the following portion of
12 Instruction No. 17, the Court's involuntary manslaughter instruction, was
13 error:

14 . . . In order for the Defendant to be found guilty of
15 the lesser crime of involuntary manslaughter, the Government
must prove each of the following elements beyond a reasonable
doubt:

16 First, the Defendant committed an act, *done either in an*
17 *unlawful manner or with wanton or reckless disregard for human*
life, which might produce death . . .

18 ECF No. [365](#) at 19 (emphasis added). Defendant concedes that this
19 instruction is taken verbatim from Ninth Circuit Model Criminal Jury
20 Instruction 8.110, but argues that this instruction would have allowed
21 the jury to convict him without a finding of gross negligence, which is
22 an essential element of involuntary manslaughter. Defendant also argues
23 that the use of the undefined term "in an unlawful manner" allowed jurors
24 to convict him based on their own determination of what is "unlawful."

25 After hearing the argument of counsel and reviewing relevant
26 authority, the Court is convinced that this instruction was appropriate

1 and not given in error. First, Instruction No. 17 tracks the language
2 of 18 U.S.C. § 1112, which states that involuntary manslaughter occurs
3 "[i]n the commission of an unlawful act not amounting to a felony, or in
4 the commission in an unlawful manner, or without due caution and
5 circumspection, of a lawful act which might produce death." Second,
6 Defendant's argument overlooks the fact that the gross negligence
7 requirement is present in the fourth section of Instruction No. 17, which
8 reads:

9 . . . Fourth, the Defendant either knew that such conduct
10 was a threat to the lives of others or knew of circumstances
11 that would reasonably cause the Defendant to foresee that such
12 conduct might be a threat to the lives of others.

13 ECF No. [365](#) at 20. Any argument that the jury found Defendant guilty of
14 involuntary manslaughter without a finding of gross negligence is
15 foreclosed by this portion of Instruction No. 17. Finally, the Ninth
16 Circuit has not only upheld the giving of Model Instruction 8.110, but
17 has ruled that it is error *not* to give Model Instruction 8.110 as a
18 lesser-included-offense instruction if the record contains evidence to
19 support it. *See United States v. Arnt*, 474 F.3d 1159, 1164-65 (9th Cir.
20 2007); *United States v. Hugs*, 384 F.3d 762, 765-68 (9th Cir. 2004). For
21 these reasons, as well as those stated on the record, the Court denies
22 Defendant's motion with regard to this basis.

23 **B. Specific Acts of the Victim, David McCraigie**

24 Defendant also argues that it was error not to allow him to testify
25 regarding prior violent acts of the victim, David McCraigie. Defendant
26 argues that he should have been able to testify to these acts because
they would bolster his claim that he was acting in self-defense. At

1 trial, the Court refused to permit this evidence based on *United States*
2 *v. Keiser*, 57 F.3d 847 (9th Cir. 1995).

3 Under Federal Rule of Evidence 402(a), a criminal defendant may
4 admit evidence of a pertinent character trait of the victim to show that
5 the victim acted in conformity therewith. Rule 405 limits Rule 402 to
6 the admission of reputation or opinion testimony, and dictates that
7 specific instances of conduct are only admissible in cases in which
8 character or a character trait is an essential element of the charge,
9 claim, or defense. Consistent with these rules, the Ninth Circuit in
10 *Keiser* held that a victim's specific acts were not admissible to show his
11 propensity for violence, but that propensity could only be shown by
12 reputation and opinion evidence. *Keiser*, 57 F.3d at 855.

13 Defendant cites *United States v. Saenz*, 179 F.3d 686 (9th Cir.
14 1999), for the proposition that evidence of specific acts is admissible
15 when it is offered not to show the victim's propensity, but to show the
16 defendant's state of mind. Defendant argues that because he sought to
17 admit evidence of Mr. McCraigie's specific acts in order to show his own
18 state of mind (and thus bolster his self-defense claim), and not to show
19 Mr. McCraigie's propensity for violence, this evidence should have been
20 admitted. The USAO responds that Defendant had ample opportunity to
21 demonstrate his state of mind when he testified about Mr. McCraigie's
22 reputation for violence, and that testimony concerning specific acts of
23 violence by Mr. McCraigie would have been unduly prejudicial.

24 Here, evidence of Mr. McCraigie's specific acts of violence was
25 properly excluded. First, as the USAO asserts, Defendant was able to
26 testify that Mr. McCraigie had a propensity for violence. This largely

1 alleviates any concerns caused by the exclusion of Mr. McCraigie's prior
2 bad acts. Additionally, and more importantly, any error in excluding
3 this evidence is non-prejudicial because Defendant would still have been
4 convicted of involuntary manslaughter even if the jury had fully believed
5 Defendant's self-defense argument. Involuntary manslaughter can occur
6 in cases of "imperfect self-defense." *United States v. Anderson*, 201
7 F.3d 1145, 1151 (9th Cir. 2000). "A defendant who intends to use non-
8 deadly force to protect himself, but who uses that force in a criminally
9 negligent way resulting in death, could be found guilty of involuntary
10 manslaughter." *Id.* Thus, in this case, even if the jury had believed
11 Defendant's claim of self-defense and found his *use of force* to be
12 reasonable under the circumstances, they would still have convicted
13 Defendant of involuntary manslaughter because they had to find that *the*
14 *manner in which he used force* was criminally negligent in order to return
15 the verdict that they did. Thus, any error caused by the Court's refusal
16 to admit evidence of Mr. McCraigie's specific acts of violence was not
17 prejudicial, and the Court denies Defendant's motion with regard to this
18 basis.

19 **C. MySpace Photos of David McCraigie**

20 Defendant also argues that the Court erred in not allowing into
21 evidence photographs of Mr. McCraigie posing with firearms that were
22 downloaded from his "MySpace" internet page. Defendant argues that these
23 photos could have been used to show Mr. McCraigie's "motive, opportunity,
24 identity, and his plan," and that they could have been used to impeach
25 two of the USAO's witnesses who testified they never saw Mr. McCraigie
26 with a gun. ECF No. [410](#) at 14-15. It is unclear what Defendant refers

1 to as Mr. McCraigie's motive, opportunity, identity, or plan, or how
2 these concepts were relevant to this case; insofar as they may relate to
3 Defendant's self-defense claim, they are non-prejudicial as noted above.
4 With regard to Defendant's proposed impeachment use, the two witnesses
5 that Defendant argues could have been impeached with the photos only
6 stated that they never saw Mr. McCraigie with a gun; internet photos of
7 Mr. McCraigie with a gun do not *per se* contradict these statements, and
8 their admission would have had serious potential to confuse or unduly
9 prejudice the jury. Accordingly, the Court denies Defendant's motion
10 with regard to this basis.

11 **II. THE USAO'S MOTION FOR UPWARD SENTENCING DEPARTURE**

12 The USAO moved for an upward departure from the United States
13 Sentencing Guideline range of 33-41 months, asking the Court to impose
14 the statutory maximum sentence of 96 months. The USAO cites several
15 guideline provisions in support of this argument.

16 First, the USAO cites U.S.S.G. § 4A1.3, which allows the Court to
17 depart upward if a defendant's criminal history category substantially
18 under-represents either the seriousness of the defendant's criminal
19 history or the likelihood that the defendant will commit other crimes.
20 The USAO directs the Court to U.S.S.G. §4A1.3(a)(2)(A) & (E), which allow
21 upward departures based on "[p]rior sentence(s) not used in computing the
22 criminal history category" or "[p]rior similar adult conduct not
23 resulting in a criminal conviction," respectively. The USAO notes that
24 Defendant has more than ten criminal convictions that are not counted
25 towards his criminal history category, and that Defendant was not charged
26 for assaultive behavior towards other individuals on the night Mr.

1 McCraigie was killed. Defense counsel responds that Defendant's juvenile
2 convictions are not an appropriate ground for departing upward pursuant
3 to § 4A1.3, and argues that the examples given in Application Note 2 to
4 § 4A1.3 demonstrate that it should not apply here. While the Court notes
5 that Defendant's criminal history category does not appear to adequately
6 reflect his criminal history, the Court finds that § 4A1.3(a)(2)(A) and
7 (E) do not apply here; subpart (A) gives the examples of "foreign and
8 tribal offenses" but does not list juvenile offenses, and subpart (E) on
9 its face only applies to "adult" criminal conduct.

10 The USAO also asks the Court to depart upward per U.S.S.G. § 5K2.1
11 because death resulted. Defense counsel responds that this should not
12 be taken into account because the involuntary manslaughter provision,
13 U.S.S.G. § 2A1.4(a), already takes death into account. As noted on the
14 record, the Court finds that § 5K2.1 does not apply in this case because
15 death is an element of involuntary manslaughter and is "adequately taken
16 into consideration by the Sentencing Commission" in formulating the
17 involuntary manslaughter guideline. U.S.S.G. § 5K2.0(a)(1) (describing
18 circumstances in which § 5K2 departures are appropriate).

19 Finally, the USAO asks the Court to depart upward per U.S.S.G.
20 § 5K2.6 because a dangerous weapon was used. U.S.S.G. § 5K2.6 allows an
21 upward sentencing departure if a weapon or dangerous instrumentality was
22 used in the commission of the offense, and states that the extent of an
23 upward increase should depend on the dangerousness of the weapon, the
24 manner in which it was used, and the extent to which its use endangered
25 others. Section 5K2.6 also states that "[t]he *discharge* of a firearm
26 might warrant a substantial sentence increase." U.S.S.G. § 5K2.6

1 (emphasis added). For the reasons noted on the record, the Court grants
2 the USAO's motion for an upward sentencing departure in this regard; the
3 use of a firearm is not an element of involuntary manslaughter, and the
4 7mm-caliber hunting rifle Defendant used on the night in question was
5 dangerous, was used dangerously, and was used in a manner that endangered
6 others.

7 Accordingly, the Court grants in part (§ 5K2.6) and denies in part
8 (§§ 4A1.3 & 5K2.1) the USAO's Motion for Upward Sentencing Departure.

9 **III. STATUS OF COUNT TWO OF THE INDICTMENT**

10 Defendant's Indictment, ECF No. [16](#), also charges Defendant with one
11 Count of discharging a firearm during and in relation to a crime of
12 violence in violation of 18 U.S.C. § 924(c)(1)(A)(iii) and (j). Because
13 the Court had ruled that involuntary manslaughter was not a "crime of
14 violence" for the purposes of § 924(c), the jury correctly did not
15 address this Count when it found Defendant guilty of involuntary
16 manslaughter.

17 At the hearing, defense counsel asked the Court to dismiss Count 2
18 of the indictment. The USAO stated his preference that Count 2 remain
19 unresolved for the time being. In order that the Court can make an
20 informed decision on this matter, the parties shall file and serve a
21 brief memorandum stating their position on how the Court should address
22 Count 2 **no later than November 30, 2011**. The parties' memoranda should
23 not exceed five (5) pages, inclusive of attachments. No responsive or
24 reply memoranda shall be permitted.

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1 For these reasons, and for the reasons stated on the record, **IT IS**
2 **HEREBY ORDERED:**

3 1. Defendant's Motion for New Trial, **ECF No. [409](#)**, is **DENIED**.

4 2. The USAO's Motion for Upward Sentencing Departure, **ECF No. [429](#)**,
5 is **GRANTED in part** and **DENIED in part** as discussed above.

6 3. The parties shall file and serve a brief memorandum, in accord
7 with the requirements stated above, stating their position on how the
8 Court should address Count 2 **no later than November 30, 2011**.

9 **IT IS SO ORDERED.** The District Court Executive is directed to enter
10 this Order and to provide copies to counsel.

11 **DATED** this 17th day of November 2011.

12
13 s/Edward F. Shea
14 EDWARD F. SHEA
United States District Judge

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